

1149 JNE/FLN

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

MICHAEL FOODS, INC.,

Civil No.

Plaintiff,

v.

**NATIONAL PASTEURIZED EGGS,
INC.,**

Defendant.

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**COMPLAINT AND
DEMAND FOR JURY TRIAL**

Plaintiff Michael Foods, Inc. ("Michael Foods"), for its Complaint against defendant National Pasteurized Eggs, Inc. ("NPE"), states and alleges as follows:

PARTIES

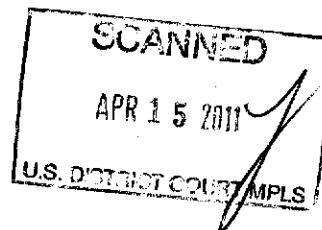
1. Plaintiff Michael Foods is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business at 301 Carlson Parkway, Suite 400, Minnetonka, Minnesota 55305.

2. Defendant NPE is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business at 2963 Bernice Road, Lansing, Illinois 60438.

JURISDICTION AND VENUE

3. The claims alleged herein arise under the Patent Laws of the United States, 35 U.S.C. § 1, *et seq.*

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).



5. This Court has personal jurisdiction over NPE under Minn. Stat. § 543.19. NPE transacts business in Minnesota, including but not limited to selling the Davidson Safest Choice® and Safest Choice™ pasteurized shell eggs in Minnesota, and has otherwise committed acts in and beyond Minnesota causing injury to Michael Foods in Minnesota. For example, the “store locator” on NPE’s website at <http://www.safeeggs.com/consumers/store-locator.html> states that NPE’s Safest Choice™ pasteurized shell eggs are available at Hy-Vee stores in Minnesota. NPE purposefully directs infringing activity toward this forum by shipping accused products into Minnesota through an established distribution channel.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c), and 1400(b).

PATENTS-IN-SUIT

7. On December 21, 1999, the United States Patent and Trademark Office duly and legally issued United States Patent 6,004,603 (“the ‘603 patent”), entitled “Method of Controlling Salmonella in Shell Eggs,” naming as inventors Joseph M. Vandepopuliere and Owen J. Cotterill. A copy of the ‘603 patent is attached hereto as Exhibit A.

8. Joseph M. Vandepopuliere and Owen J. Cotterill assigned the entire right, title and interest in the ‘603 Patent to the University of Missouri. The University of Missouri in turn granted Michael Foods an exclusive license that conveyed all substantial rights to the ‘603 patent. Michael Foods is the exclusive licensee of the ‘603 patent and owns all substantial rights in the ‘603 patent.

9. On October 16, 2001, the United States Patent and Trademark Office duly and legally issued United States Patent 6,303,176 (“the ‘176 patent”), entitled “Method of

Controlling *Salmonella* in Shell Eggs," naming as inventors Joseph M. Vandepopuliere and Owen J. Cotterill. A copy of the '176 patent is attached hereto as Exhibit B.

10. Joseph M. Vandepopuliere and Owen J. Cotterill assigned the entire right, title and interest in and to the '176 patent to the University of Missouri. The University of Missouri in turn granted Michael Foods an exclusive license that conveyed all substantial rights to the '176 patent. Michael Foods is the exclusive licensee of the '176 patent and owns all substantial rights in the '176 patent.

11. On December 13, 2005 the United States Patent and Trademark Office duly and legally issued United States Patent 6,974,599 ("the '599 patent"), entitled "Method of Controlling *Salmonella* in Shell Eggs," naming as inventors Joseph M. Vandepopuliere and Owen J. Cotterill. A copy of the '599 patent is attached hereto as Exhibit C.

12. Joseph M. Vandepopuliere and Owen J. Cotterill assigned the entire right, title and interest in and to the '599 patent to the University of Missouri. The University of Missouri in turn granted Michael Foods an exclusive license that conveyed all substantial rights to the '599 patent. Michael Foods is the exclusive licensee of the '599 patent and owns all substantial rights in the '599 patent.

NPE'S INFRINGING ACTIVITY

13. NPE is in the business of pasteurizing shell eggs and selling pasteurized shell eggs.

14. NPE uses a pasteurization process for shell eggs that is described on its website located at www.safeeggs.com (the "NPE Website"). The NPE Website reveals that as part of this pasteurization process, NPE puts its "farm-fresh eggs through a giant all-natural water bath for just under one hour." According to NPE, "the key is the precision of

the computer controlled bath which ensures FDA standards for pasteurization, destroying the bacteria and viruses without cooking the eggs. The constant movement of [NPE's] eggs and water while in the bath is a key component in assuring the eggs don't cook."

15. NPE also states on the NPE Website that:

The eggs continue through the water bath where this mixture of exact time and temperature assures accurate pasteurization. The eggs are pasteurized to exceed a 5 log reduction of harmful bacteria or viruses without cooking the eggs. The 5 log reduction of Salmonella is the regulated standard set by the FDA required for a product to be labeled pasteurized. The NPE patented process ensures that eggs meet and exceed this 5 log FDA requirement without cooking the eggs.

(emphasis added).

16. NPE's statements on the NPE Website reveal that, following pasteurization, NPE's eggs "are conveyed out of the pasteurization bath and through an automatic waxing unit which applies a food grade wax protection over the egg shell." After NPE's eggs leave the waxing unit, "[t]his finished product is then packed, moved to coolers and brought to below 45°F., and palletized for shipment."

17. NPE has also made statements on the NPE Website and in product literature regarding the extended shelf-life of its pasteurized shell eggs. For example, NPE's marketing statements on the www.safeeggs.com website state that the "Safest Choice™ pasteurized shell eggs are labeled with a "Best By" date which means the eggs will have their best quality before this date," and that where NPE's eggs are labeled with a "Sell By" date, the "Safest Choice™ pasteurized shell eggs are good for 6-8 weeks after the sell by date." NPE has also stated in product literature and on the NPE Website that "[NPE's] eggs are safe to eat 4-6 weeks after this "Best By" date."

18. According to the NPE Website, “[t]he total pasteurization process above results in destruction of bacteria and viruses inside and outside the shell, preserving freshness and taste as well as significantly extending the shelf life of the eggs.”

19. NPE’s manufacturing process described above by NPE in its related marketing statements infringes the claims of the ‘603 patent, and NPE’s pasteurized eggs manufactured by this process infringe the claims of the ‘176 and ‘599 patents.

COUNT I: INFRINGEMENT OF THE '603 PATENT

35 U.S.C. § 1, et seq.

20. Michael Foods incorporates the allegations contained in paragraphs 1 through 20 above as though fully set forth herein.

21. NPE is infringing at least claim 1 of the ‘603 patent in violation of 35 U.S.C. § 271(a) by using methods claimed in the ‘603 patent to make pasteurized shell eggs, including the Davidson Safest Choice® and Safest Choice™ pasteurized shell eggs, within the United States.

22. NPE knows or should know of the ‘603 patent and is willfully infringing the ‘603 patent.

23. Michael Foods has suffered monetary damages as a result of NPE’s infringement of the ‘603 patent in an amount to be determined at trial.

24. Michael Foods has suffered irreparable harm by NPE’s infringement of the ‘603 patent and will continue to suffer irreparable harm in the future unless NPE is enjoined from infringing the ‘603 patent.

COUNT II: INFRINGEMENT OF THE '176 PATENT

35 U.S.C. § 1, et seq.

25. Michael Foods incorporates the allegations contained in paragraphs 1 through 24 above as though fully set forth herein.

26. NPE has infringed and is infringing at least claim 1 of the '176 patent in violation of 35 U.S.C. § 271(a) by making, using, offering to sell, and/or selling pasteurized shell eggs, including the Davidson Safest Choice® and Safest Choice™ pasteurized shell eggs, within the United States.

27. NPE has infringed and is infringing at least claim 1 of the '176 patent in violation of 35 U.S.C. § 271(b) and/or (c) by actively inducing others to infringe and/or contributing to the infringement by others in making, offering to sell, selling or using pasteurized shell eggs, including the Davidson Safest Choice® and Safest Choice™ pasteurized shell eggs, within the United States.

28. NPE knows or should know of the '176 patent and is willfully infringing the '176 patent.

29. Michael Foods has suffered monetary damages as a result of NPE's infringement of the '176 patent in an amount to be determined at trial.

30. Michael Foods has suffered irreparable harm by NPE's infringement of the '176 patent and will continue to suffer irreparable harm in the future unless NPE is enjoined from infringing the '176 patent.

COUNT III: INFRINGEMENT OF THE '599 PATENT

35 U.S.C. § 1, et seq.

31. Michael Foods incorporates the allegations contained in paragraphs 1 through 30 above as though fully set forth herein.

32. NPE has infringed and is infringing at least claim 1 of the '599 patent in violation of 35 U.S.C. § 271(a) by making, using, offering to sell, and/or selling pasteurized shell eggs, including the Davidson Safest Choice® and Safest Choice™ pasteurized shell eggs, within the United States.

33. NPE has infringed and is infringing at least claim 1 of the '599 patent in violation of 35 U.S.C. § 271(b) and/or (c) by actively inducing others to infringe and/or contributing to the infringement by others in making, offering to sell, selling or using pasteurized shell eggs, including the Davidson Safest Choice® and Safest Choice™ pasteurized shell eggs, within the United States.

34. NPE knows or should know of the '599 patent and is willfully infringing the '599 patent.

35. Michael Foods has suffered monetary damages as a result of NPE's infringement of the '599 patent in an amount to be determined at trial.

36. Michael Foods has suffered irreparable harm by NPE's infringement of the '599 patent and will continue to suffer irreparable harm in the future unless NPE is enjoined from infringing the '599 patent.

REQUEST FOR A JURY TRIAL

37. Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Michael Foods respectfully requests a trial by jury of any and all issues on which trial by jury is available under applicable law.

PRAYER FOR RELIEF

WHEREFORE, Michael Foods respectfully requests this Court:

- A. Enter judgment that NPE has infringed the '603 patent, '176 patent and '599 patent in violation of 35 U.S.C. § 271(a), (b) and/or (c);
- B. Enter orders preliminarily and permanently enjoining NPE, and its officers, agents, servants, employees, and all persons in active concert or participation with any of the foregoing, who receive actual notice by personal service or otherwise of the orders, from infringing the '603 patent, '176 patent and '599 patent in violation of 35 U.S.C. § 271(a), (b) and/or (c);
- C. Award Michael Foods its respective damages in amounts sufficient to compensate it for NPE's infringement of the '603 patent, '176 patent and '599 patent, together with pre-judgment and post-judgment interest and costs, pursuant to 35 U.S.C. § 284;
- D. Declare this case to be "exceptional" under 35 U.S.C. § 285 and to award Michael Foods its costs, expenses and attorneys' fees incurred in this action; and
- E. Award Michael Foods such other and further relief as this Court deems just and proper.

Dated: April 15, 2011

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**ATTORNEYS FOR PLAINTIFF
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April 15, 2011

Clerk of Court
United States District Court
U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

BY MESSENGER

Re: Michael Foods, Inc. v. National Pasteurized Eggs, Inc.

Dear Clerk of Court:

Enclosed please find a check in the amount of \$350 for the filing fee. The Complaint and other initiating documents were submitted by e-mail today.

Please give the signed and sealed Summons and the file stamped copy of the Complaint to Claire Ouellette. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Elizabeth Cowan Wright".

Elizabeth Cowan Wright

WRIEC:dilmr
Enclosures

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